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COURT OF CRIMINAL APPEALS
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No. PD-1053-20

IN THE TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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JUAN MACEDO
Respondent (Appellant in the Court of Appeals)
v.
THE STATE OF TEXAS
Petitioner (Appellee in the Court of Appeals)

On Review from No. 14-19-00386-CR
in which the Fourteenth District Court of Appeals
considered Cause Number 1494135
from 184th District Court
Harris County, Texas

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER SOURCES

STATEMENT OF THE CASE

The State's Statement of the Case and Procedural History is adequate.

GROUNDS FOR REVIEW

The State advances two issues for review:

Ground One: Does Article 37.07 § 3(a)(1) allow for admission of evidence the trial court determines is "relevant to sentencing" without requiring it to be admissible under the Rules of Evidence?

Ground Two: Assuming error in Ground One, did the Fourteenth Court of Appeals err in finding appellant was harmed?

STATEMENT OF FACTS

The State does not include a Statement of Facts section in its brief; however, its Statement of the Case and Procedural History section provide sufficient facts of the case.

SUMMARY OF THE ARGUMENT

The trial court erred in admitting State's Exhibit 177 into evidence during the punishment phase of Mr. Macedo's trial. Exhibit 177, a police report that was admitted together with State's Exhibit 176, a judgment from a misdemeanor assault conviction in California, contained impermissible hearsay.

Code of Criminal Procedure Article 37.07 § 3(a) controls the submission of evidence in the punishment phase of trials when the jury is deciding sentencing. This provision does not exempt punishment evidence from also being admissible under the Rules of Evidence. The 1993 amendments to this statute expanded the types of prior "extraneous offenses" or "bad acts" which was admissible in punishment proceedings, consistent with a possible legislative desire to prevent more decisions like *Grunsfeld v. State*.

Once the court of appeals correctly found the trial court had erred, it then engaged in the requisite harm analysis. This careful analysis led the appellate court to the correct conclusion that the erroneous admission of State's Exhibit 177 harmed Mr. Macedo.

ARGUMENT

FIRST GROUND FOR REVIEW: ARTICLE 37.07 § 3(a)(1) ALLOWS FOR THE ADMISSION OF EVIDENCE THE TRIAL COURT DETERMINES IS "RELEVANT TO SENTENCING," AS LONG AS SUCH EVIDENCE IS ADMISSIBLE UNDER THE TEXAS RULES OF EVIDENCE

A. *Introduction*

All evidence admitted during a criminal trial must clear at least two hurdles – relevancy and trustworthiness. Relevancy, in the context of the punishment phase of trial before a jury, is whatever is "helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case." *Ellison v. State*, 201 S.W.3d 714 (Tex. Crim. App. 2006).

Trustworthiness involves both authentication (that the evidence is what its proponent purports it to be) and accuracy (that what the evidence shows is true). The Rules of Evidence address authenticity in its sections which cover authentication and identification; contents of writings, recordings, and photographs, etc. TEX. R. EVID. Art. IX & X. The evidentiary rules regarding accuracy are found in the sections governing witness testimony and hearsay. TEX. R. EVID. Art. VI, VII, & VIII. It is not relevance or authentication that concerns the evidence at issue in the case at hand, but the trustworthiness, or accuracy, of its contents. Code of Criminal Procedure 37.07 § 3(a) allows for any evidence

the court deems relevant to sentencing, but, as reasoned below, that evidence must still be proven authentic and reliable.

B. *Grunsfeld v. State and pre-1993 37.07 § 3(a)*

Since State posits that the 1993 amendments to Code of Criminal Procedure 37.07 § 3(a) was a response to *Grunsfeld*, it is useful to review that case.

1. Grunsfeld v. State

When the Court of Criminal Appeals decided *Grunsfeld*, the issue was not whether evidence of extraneous acts were admissible at sentencing under the Rules of Evidence, but whether unadjudicated extraneous acts were admissible under the then-controlling version of Code of Criminal Procedure 37.07 § 3(a). *Grunsfled v. State*, 843 S.W.2d 521 (Tex. Crim. App. 1992). The Code at that time allowed as punishment evidence "any matter the court deems relevant to sentencing, including the prior criminal record of the defendant…" *Id.* at 523. The decision hinged on 37.07 § 3(a)'s definition of "prior criminal record," "a final conviction in a court of record…" *Id.*

The discussion in that case was centered exclusively on whether unadjudicated extraneous offenses were admissible under the Code of Criminal Procedure's definition of "prior criminal record." *Id.* There was no discussion of the Rules of Evidence. If the 1993 amendments were, as the State believes, a

direct legislative response to *Grunsfeld*, the actions of the legislature were elicited not by Rule of Evidence restrictions, but by those in 37.07 § 3(a).

If the courts, when interpreting statutes, should seek to "effectuate the 'collective' intent of the legislators who enacted the legislation," *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991), the clear intent of the *Grunsfeld*-reationary legislation was to ensure unadjudicated criminal offenses or acts were admitted during the punishment phase of criminal trials. This is the only construction that gives the amended statute the effect the legislature intended. *Ex Parte Trahan*, 591 S.W.2d 837, 842 (Tex. Crim. App. 1979).

2. 1993 Amendments to Code of Criminal Procedure § 37.07 3(a)

Although the State asserts that these amendments deleted "as permitted by the Rules of Evidence" as a response to *Grunsfeld* (State's Brief at 15, 18), the majority of the amendments made to 37.07 § 3(a) work directly to allow for the admission of unadjudicated offenses or "bad acts" at the punishment phase of trials. Where before the statute allowed evidence of matters relevant to sentencing "including the prior criminal record of the defendant," it now allowed matters "including *but not limited to* the prior criminal record of the defendant." https://lrl.texas.gov/scanned/sessionLaws/73-0/SB_1067_CH_900.pdf at 174. Furthermore, the section, as amended, adds

"notwithstanding Rules 404 and 405, Texas Rules of Criminal Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act," and then immediately follows by striking the phrase "The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged." *Id.* A the amendments show that the struck phrase "as permitted by the Rules of Evidence" is a minor change compared to the others:

> Section 3(a), Article 37.07, Code of Criminal Procedure, is amended to read as follows: (a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may, ~~as permitted by the Rules of Evidence~~, be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including *but not limited to* the prior criminal record of the defendant, his general reputation, ~~and~~ his character, *an opinion regarding his character, the circumstances of the offense for which he is being tried and, notwithstanding Rules 404 and 405, Texas Rules of Criminal Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.* ~~The term prior criminal record means a final conviction in a court of record or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged~~.

Id.

C. *Evidence Admission Requires Both Relevance and Trustworthiness*

1. Purpose of Rules of Evidence

The purpose of the Rules of Evidence is to "administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination". TEX. R. EVID. 102. Rules such as those against the admission of hearsay aim to provide circumstantial guarantees of trustworthiness. Jeff Brown & Reece Rondon, *Texas Rules of Evidence Handbook*, 786 (2019).

The relevance of State's Exhibits 176 and 177 are not in issue. There was no objection to their relevance, as a defendant's criminal record, adjudicated of otherwise, is relevant to sentencing. CODE OF CRIM. PROC. ART. 37.07 § 3(a). The objection of defense counsel at trial to State's Exhibit 177 was that of "hearsay." 5 R.R. at 85-86. The judge did not address the hearsay concerns, but only whether the documents (which the State represented to be certified copies of judgments when 177 was actually a police report) were indeed certified. 5 R.R. at 86. The objection was to the trustworthiness and accuracy of the statements contained in the offense report, while the ruling addressed only the authenticity of the report. Certified copies of public records are self-authenticating

documents under Rule of Evidence 902(4); however, what is contained in those documents must be admissible. In other words, while the document is proved authentic by its inclusion in Rule 902(4), the court must still address the accuracy and trustworthiness of its contents.

Police reports do not fall within the exceptions to the hearsay rule that other public reports do. Rule of Evidence 803(8), which governs the admissibility of public records specifically excludes, in criminal cases, matters observed by law-enforcement personnel, reflecting the possibility that observations made by police officers during investigations may be unreliable due to the adversarial nature of the confrontation between officer and criminal defendant. *Fischer v. State*, 252 S.W.3d 375, 382-83 (Tex. Crim. App. 2008); *United States v. Quezada*, 754 F.2d 1190, 1193-94 (5th Cir. 1985).

2. Statutory Interpretation

It is agreed upon that the focus of statutory interpretation should be on the literal text of the statute in question. *Boykin*, 818 S.W.2d at 785. If, as the State correctly posits in its brief, an amended statute should be construed as if originally enacted in its amended form, this is even clearer. *Powell v. Hocker*, 516 S.W.3d 488, 493 (Tex. Crim. App. 2017).

The State cites as proof of the legislature's intent to unfetter punishment phase evidence from the Rules of Evidence the striking of the phrase "as

permitted by the Rules of Evidence." However, if the legislature intended that result, it would have made that explicit. Nowhere does 37.07 § 3(a) state that the Rules of Evidence do not apply to the punishment portion of criminal trials. The only mention of the Rules of Evidence is when the legislature made clear that certain punishment evidence still must comply with Rules 404 and 405 or 609(d), thus ensuring that if a conflict arose between 37.07 § 3(a) and those rules, the evidentiary rules would prevail.

That the legislature chose to strike "as permitted by the Rules of Evidence" does not mean that trial punishment phases are an evidentiary free-for-all. The deletion may have served simply to ensure that the reader did not infer by its presence that other sections of the Code of Criminal Procedure need not comply with the Rules of Evidence if that specific phrase was not included in those sections. In the entirety of the Code of Criminal Procedure, no other articles note that the Rules of Evidence apply to that article. Should the courts interpret the absence of "as permitted by the Rules of Evidence" in 37.07 § 3(a) to mean that the evidentiary rules do not apply to punishment, does the absence of that phrase in Code of Criminal Procedure article 36 therefore mean that the Rules of Evidence do not apply in the culpability phase of trials? Of course not. Inclusion of a mandate for judges to follow the Rules of Evidence during punishment proceedings was unnecessary and superfluous.

Additionally, the Rules of Evidence are intended to apply to proceedings in Texas courts unless otherwise noted. TEX. R. EVID. 101(b). Although a court can admit or exclude evidence if required to do so by other laws or rules (TEX. R. EVID. 101(d)), the Code of Criminal Procedure does not direct judges that the Rules of Evidence do not apply to punishment proceedings, in § 3(a) or otherwise.

Although Appellant Macedo believes 37.07 § 3(a) does not, on its face, intend to do away with the Rules of Evidence during jury sentencing, it is necessary to address the State's contention that such end result is the obvious desire of the legislature in amending the statute. Such a reading would result in farcical proceedings.

Where the application of a statute's plain language would lead to absurd consequences, which the Legislature could not possibly have intended, the court should not seek to apply the language literally. *Boykin*, 818 S.W.2d at 785. If the literal application of the statute's plain text would lead to absurd results, then the court may consider, in arriving at a sensible interpretation, factors such as the probable consequences of a particular interpretation. *Landford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 587 (Tex. Crim. App. 1993).

Although Appellant Macedo advances that it is axiomatic that the Rules of Evidence apply to punishment proceedings, applying the State's view belies

the absurdity of its stance. If, as the State wishes, any evidence that is relevant is admitted at sentencing, lest the trial court be found to have abused its discretion in applying the Rules of Evidence, hearsay (including second- or third-hand varieties) would be testified to as fact, TEX. R. EVID. 801-806 be damned; any person could give their opinion as to any matter of relevance, whether that person had any personal knowledge based on their rational perception (TEX. R. EVID. 701); any individual with an internet connection could wax as an expert, despite lack of training, skill, or expertise (TEX. R. EVID. 702); any slip of paper produced by either side that was relevant to sentencing would be admitted, whatever the source (TEX. R. EVID. 901-903); lawyers, spouses, doctors, and others could be compelled to testify against previously-protected persons, should the rules of privileges be disregarded (TEX. R. EVID. 501-513).

The Rules of Evidence bring order to chaos and lend our criminal institutions integrity. Doing away with them during sentencing would rob those proceedings of assurances of fairness, trustworthiness, and accuracy.

D. *Post-1993 Interpretation of 37.07 § 3(a)*

This is not an issue of first impression, as courts have been considering evidence admissibility at punishment for years and have consistently applied the Rules of Evidence in doing so. Both this Court and courts of appeals have heard cases in which the Rules of Evidence were applied to punishment

proceedings. Although the State's brief asserts that none of these cases specifically addressed the issue at hand, a reading of them shows that they, in fact, have. Indeed, although not explicitly proclaiming "the Rules of Evidence are heretofore to apply to punishment phases of trials," each of the courts below implicitly ruled so by evaluating the admissibility of punishment evidence and using the Rules of Evidence to do so. Finding violations of those rules implicitly finds that they do apply. *Dixon v. State*, 244 S.W.3d 472, 482 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

1. Courts of Criminal Appeals

a. *Ellison v. State*

In *Ellison v. State*, this Court had to decide if a probation officer's testimony that, in her opinion, the defendant was not a suitable candidate for probation, was properly admitted during the punishment phase. 201 S.W.3d 714. The court first found that the testimony was relevant because it was helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case. *Id.* at 719.

The 1993 amendments to Code of Criminal Procedure 37.07 § 3(a) were discussed, and the court concluded that nothing in that statute "required that the evidence be admitted if it is excludable under some other statute or rule."

Id. at 721. In discussing which evidence a jury may hear, the court noted that juries cannot view pre-sentence investigative reports (PSIs), which judges can. *Id.* The reasoning behind that limitation is that a "jury must get all its information from properly admitted evidence at the punishment hearing," implying that a PSI is *not* "properly-admitted evidence." *Id.* It cannot be seriously argued that a PSI is not relevant to sentencing under 37.07 § 3(a), so its bar to admission in jury punishment proceedings is found in another source – the Rules of Evidence.

Having found that probation officer testimony is admissible generally, the Court turned to whether the specific testimony in *Ellison* was admissible. *Id.* at 722-23. As the State acknowledges, if only in a footnote, it was, in fact, the Rules of Evidence that this Court turned to in support of the admission of the probation officer's testimony, when it found that the witness's testimony was admissible under Rules 701 and 702. *Id.* at 723. State's Brief on Discretionary Review at 24 n. 4.

b. *Smith v. State*

Although *Smith* is discussed in the State's Brief (State's Brief on Discretionary Review at 20), that case is not centered on 37.07 § 3(a), but rather on 37.07 § 3(d), which governs the admissibility of presentence investigative

reports (PSI) in court punishment proceedings. 227 S.W.3d 753 (Tex. Crim. App. 2007); CODE CRIM. PRO. 37.07 § 3(d). The brief discussion of the 1993 changes to 37.07 § 3(a) in *Smith* focuses on the main thrust of those changes – to ensure the type of unadjudicated extraneous offenses banned in *Grunsfeld* were now admissible. *Smith*, 227 S.W.at 759.

2. Courts of Appeals

The State's assertion that the court of appeals relied on cases that "all failed to address the issue in this case and that can be distinguished" is not supported by a reading of those decisions. State's Brief on Discretionary Review at 23. At least six of the courts of appeals have used the Rules of Evidence in evaluating admissibility during the sentencing phase of trials.

a. Houston (Fourteenth) – The Fourteenth Court of Appeals noted that the post-*Grunsfeld* change in punishment proceedings was to remove the "strict constraints" previously placed on the introduction of extraneous offenses. *Hoffman v. State*, 874 S.W.2d 138, 140 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). There was no mention that the change was to unencumber punishment evidence from the constraints of the Rules of Evidence. Furthermore, in *Dixon v. State*, which the State dismissed because the appellate court did not cite to 37.07 § 3(a)(1) specifically, the same court evaluated contested punishment evidence under the Rules of Evidence,

specifically the rule against hearsay and its excited utterance exception. 224 S.W.3d at 486.

b. Houston (First) – Although the State contends that 37.07 § 3(a)(1) "was not argued and the First Court of Appeals did not address it" (State's Brief on Discretionary Review at 24-25, n. 5), in *Castor v. State*, the First Court of Appeals found that the trial court had abused its discretion in allowing inadmissible hearsay evidence at the punishment phase of trial. Nos. 01-18-00148-CR & 01-18-00149-CR, 2018 WL 6205891 at 4, 6 (Tex. App.—Houston [1st Dist.] Nov. 29, 2018, no pet.) (mem. op. not designated for publication).

c. Fort Worth – The Fort Worth Court of Appeals evaluated admission of punishment phase evidence over a hearsay objection. *Panchol v. State,* No. 02-12-00228-CR, 2013 WL 3874763 at 6 (Tex. App.—Fort Worth July 25, 2013, pet. ref'd)(mem. op. not designated for publication). The court found that, while general reputation evidence is an exception to the hearsay rule, the State elicited testimony that went beyond general reputation evidence when the witness testified to specific acts to show a bad reputation. *Id*. The court concluded that this violated the rule against hearsay, thus applying the Rules of Evidence to punishment proceedings. *Id.* at 7.

Additionally, the Fort Worth appellate court ruled inadmissible some punishment phase evidence as to the defendant's suitability for probation. *Patterson v. State*, 508 S.W.3d 432 (Tex. App.—Fort Worth 2015, no pet.). Although the State dismisses *Patterson* because it "never references 37.07 § 3(a)(1)" (State's Brief on Discretionary Review at 25, n. 5), the appellate court does evaluate punishment evidence under 37.07 § 3(a). *Id.* at 437. In *Patterson*, two law enforcement officers testified that Defendant would not be a good candidate for probation, in their opinion. *Id.* 434, 436. The court contrasted their testimony with that in *Ellison*, to show that the testimony in its case was not admissible as either expert testimony under Rule of Evidence 702 or layperson testimony under Rule 701. *Id.* at 437-38. "Although evidence offered at the punishment phase of trial regarding the suitability of the defendant for probation is a matter 'relevant to sentencing' under article 37.07 section 3(a) of the code of criminal procedure, when the defendant seeks probation, the sentencing court must still determine whether this relevant evidence is admissible." *Id.* at 437, citing *Ellison*, 201 S.W.3d at 721-23. Without making an explicit pronunciation that the Rules of Evidence apply to punishment proceedings, the court simply found it to be so and engaged in analysis on that basis.

d. Corpus Christi – The State dismissed *Santos v. State* because 37.07 § 3(a)(1) "was not argued or addressed and error was conceded by the State," (State's Brief on Discretionary Review at 25, n. 5). The error that the State conceded was admitting, at the punishment phase of a trial, evidence that violated the Rules of Evidence. *Santos v. State*, No. 13-13-00110-CR, 2013 WL 6175183 at 1 (Tex. App.—Corpus Christi Nov. 21, 2013, no pet.)(mem. op. not designated for publication). The Corpus Christi court analyzed punishment evidence under Rules of Evidence 103 and 801. *Id.* In that case, the errors consisted of admitting criminal history evidence through the hearsay testimony of a probation officer. *Id*.

e. Beaumont – Likewise, the court of appeals in Beaumont applied the Rules of Evidence to punishment proceedings. *Spikes v. State*, No. 09-00-320-CR, 2002 WL 1478540 (Tex. App.—Beaumont July 10, 2002, no pet.)(not designated for publication). In that case, the court upheld reputation testimony during punishment under both 37.07 and as an exception to the hearsay rule, under Rule of Evidence 803(21). *Id.* at 2.

f. El Paso – The State dismissed the El Paso court of appeals decision in *Hernandez v. State* as one which simply "cites to Rule 403 and *Ellison* in determining if evidence is relevant to sentencing, and did not hold all rules of evidence apply to sentencing." State's Brief on Discretionary Review at 25, n.

5. However, that is precisely what the court did hold. The court rules, in discussing the admissibility of evidence at the punishment phase, that "the trial court must still restrict the admission of evidence to that which is relevant to sentencing and must operate within the bounds of the Texas Rules of Evidence…," *Hernandez v. State*, No.08-13-0277-CR, 2015 WL 5260887 at 5 (Tex. App.—El Paso, Sept. 9, 2015, no pet.)(not designated for publication) (although the same court later reversed course and held that hearsay is not excluded during punishment in *Montoya v. State*, No. 08-17-00196-CR, 2019 WL 5288369 at 7 (Tex. App.—El Paso Oct. 18, 2019, pet. ref'd)(not designated for publication)).

E. *Trial Court Abused its Discretion by Admitting Police Report During Punishment Phase of Mr. Macedo's Trial*

As explained above, Mr. Macedo's objection to State's Exhibit 177, the offense report from the Orange County, California, Sheriff's Department, was not one of authentication, but of hearsay. 5 R.R. at 85. There was no objection to the report's authenticity, that it was what the State purported it to be, i.e. a police report. The trial court inquired about its authenticity when asking the State if it was a certified copy, and then abused its discretion in admitting it despite police reports not being included in the hearsay exception for public reports. 5 R.R. at 85-86; TEX. R. EVID. 803(8)(A)(ii).

1. Rules of Evidence

Certain public documents are exceptions to the rule against hearsay. TEX. R. EVID. 803(8). Police reports are specifically exempted from this exception. TEX. R. EVID. 803(8)(B). The reasoning behind this exemption is the possibility that observations made by police officers during an investigation of a crime may be unreliable because of the adversarial nature of the enterprise. *Fischer*, 252 S.W.3d at 382-82; *Quezada*, 754 F.2d at 1193-94. Police reports are also inadmissible as a business record under Rule 803(6) (see *Cole v. State*, 839 S.W.2d 798, 811 (Tex. Crim. App. 1990), but that rule is not relevant to this issue since the State did not file the exhibit in advance of trial, in accordance with Rule 902 (10)(A), nor present a sponsoring witness.

Also, State's Exhibit 177 contained statements made by the Complainant to the officer. Without the officer present to testify as to the nature of those statements, they are hearsay. Should the state have wanted to ensure their admissibility, it could have called the arresting officer listed in the report to testify as to whether the Complainant's statements were made under circumstances that would except them from the hearsay rule, such as present sense impressions, excited utterances, or then-existing mental, emotional, or physical condition. TEX. R. EVID. 803(1)-(3).

2. State's Brief Confuses the Issues

In coming to its conclusion that the trial court did not abuse its discretion in admitting State's Exhibit 177, the State focuses almost exclusively on whether that exhibit was relevant under 37.07 § 3(a) and *Ellison*, and whether it was admitted after a Rule 403 balancing test. State's Brief on Discretionary Review at 27-30.

The State confuses the issues, as relevance was not the contested issue at trial. There was no objection at trial to the California assault's relevancy to punishment, lacking probative value, or being prohibited by Rule 403. Nor was that argued by Defense Counsel on appeal.

Mr. Macedo does take issue with the State's assertion that its Exhibit 177 was introduced for the purpose of showing the Complainant was the "Jane Doe" listed as the victim/complainant in State's Exhibit 176, a certified copy of judgement. This contention is unsupported by the record. The record shows that Complainant's father, Armando Alvarado, testified that Complainant and Mr. Macedo were living together, along with Complainant's parents, in California at the time of the arrest. 5 R.R. at 84. The witness testified that Mr. Macedo was arrested for assaulting the Complainant. 5 R.R. at 85. Furthermore, State's Exhibit 176, the certified copy of judgment against Mr. Macedo, lists the offense as "corporal injury- spouse." 7 R.R. at 241. The link between State's Exhibit 176 and the Complainant was successfully established by the

uncontested and unobjected to testimony of Mr. Alvarado. There was no question that the victim/complainant in the California conviction was the same person as the Complainant in the murder case. Additionally, the State never makes this association for the jury. 5 R.R. at 104. In its closing at punishment, the State makes no effort to prove that the Complainant in the case before the jury was the same complainant in State's Exhibit 176 because the connection had been made through their witness and no one was confused about who the "complainant/victim" in State's Exhibit 176 was. Defense counsel asked no questions of the sponsoring witness and made no objections to the State's closing argument. 5 R.R. at 94; 104.

Overruling Mr. Macedo's objection to the admission of State's Exhibit 177 was error, and the trial court abused its discretion in its admission of the report. This court should affirm the court of appeals opinion on this issue.

GROUND FOR REVIEW TWO: THE COURT OF APPEALS CORRECTLY FOUND THAT MR. MACEDO WAS HARMED BY THE TRIAL COURT'S ERROR

A. *Standard of Review*

Non-constitutional errors that do not affect substantial rights must be disregarded. TEX. R. APP. PROC. 44.2(b), *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). A substantial right is affected when the erroneously admitted evidence had "a substantial and injurious effect or influence" on the jury's verdict. *Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018). To find that there is no harm, there must be a fair assurance from examination of the record that the error did not influence the jury, or had but a slight effect. *Id.*

B. *Analysis*

When determining harm, the courts should consider the entire record, including admitted testimony or physical evidence, the nature of the evidence supporting the verdict, the character of the alleged error, how it might be considered in connection with other evidence in the case, and whether the State emphasized the error. *Motilla v. State*, 78 S.W.3d 352, 355-56 (Tex. Crim. App. 2002); *Gonzalez*, 544 S.W.3d at 373-74.

There was evidence presented at trial concerning the offense, including allegations that Mr. Macedo lied about committing the offense, and that he was abusive to the Complainant and his son. 5 R.R. at 95-96. But even the testimony of Complainant's father during punishment, which included an account of the

2002 assault in California, did not include the information in State's Exhibit 177, as detailed below. 5 R.R. at 87-88.

This was not cumulative of other, unchallenged, evidence. *McNac v. State*, 215 S.W.3d 420 (Tex. Crim. App. 2007). No other evidence was presented that Complainant alleged she was bitten by Mr. Macedo. This information was only contained in State's Exhibit 177, and only spoken about before the jury during the State's closing. Potential harm was not defused by the properly admitted evidence, and evidence of biting did not come in through other sources. *King v. State*, 953 S.W.2d 266, 274 (Tex. Crim. App. 1997).

Although evidence of domestic abuse is always disturbing, not all forms of abuse have the same psychological effect. Hitting, shoving, or elbowing, while illegal and upsetting, is very different from biting someone, especially biting someone in the face. That is the precise reason the State emphasized Exhibit 177 in its closing. The distressing image of Mr. Macedo biting his wife's face in anger surely had the type of indelible impact the State intended.

Furthermore, that Exhibits 176 and 177 were two of only three exhibits admitted during the punishment phase of the trial only served to attract more of the jury's attention and give them more weight. Additionally, the State's closing put further emphasis on its Exhibit 177. The State's extended argument can have a substantial effect and influence on the jury's punishment. *Gonzalez*,

544 S.W. at 373-73; *Haley v. State*, 173 S.W.3d 510, 519 (Tex. Crim. App. 2005). Hammering to the jury the contents of Exhibit 177 was a prominent piece of the State's argument at punishment:

> You can ask for the evidence to come back and you can read this. You can read these judgments. You can learn about the defendant biting Maria. Where does a person go in their mind to bite somebody? We teach children don't bite people. You should be worried about being bit by a dog, not by your husband. How vicious does somebody have to be to bite? How angry. You can look at this, and you should if you want to.

5 R.R. at 104.

Of the four typed pages that comprise the State's closing argument, the prosecutor spent almost half a page focusing on this one exhibit. He then asked the jury to request to look at it.

The jury did look at it. (See Appendix). Notably, the jury asked specifically for the exhibits the State referenced in closing. What they saw was the allegation that Mr. Macedo "kicked victim in the jaw and bit her on the right eye area" (See State's Brief on Discretionary Review Appendix). Page three of the exhibit notes that one child, age one, was present during the violence. The last page of the report contains a written narrative from a police officer, which states that "Juan got angry with her because there was no salt in the salt shaker," and that "Juan walked into the bedroom and kicked her in the jaw as

she sat on the bed. Juan then bit her on the right side of her face below her eye." The State contends that the nature of the offense itself and testimony about prior abuse render the biting ineffectual, but it is unrealistic to say that this made no significant impact on the jury. The mental imagery of this account is jarring, and of a different stripe than the other abuse allegations made during this trial.

C. *Conclusion*

There is little question that this error "materially affected the jury's deliberations," as the jury asked to view this exhibit – and only this exhibit – during its deliberations. *McNac*, 215 S.W.3d at 425.

The range of punishment for murder is five to ninety-nine years to life. TEX. PENAL CODE §§ 12.32, 19.02(c). Mr. Macedo received the maximum. Although it cannot be shown that the jury would not have given Mr. Macedo life imprisonment based on the properly admitted evidence, it also cannot be said with any fair assurance that State's Exhibit 177 did not influence the jury or influenced it only slightly, given how the State emphasized the exhibit in its closing and the fact that the jury examined the exhibit during punishment deliberations. There is little doubt that these allegations are inflammatory and had an impact on the jurors, thus this Court should not "relegate the pervasive

and emotional characteristics of this impermissible testimony…to the benign category of harmless error." *Haley,* 173 S.W.3d at 519.

PRAYER

Mr. Macedo respectfully prays that this Court affirm the decision of the Fourteenth Court of Appeals.

Respectfully submitted,

ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

/s/ Miranda Meador
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CERTIFICATE OF SERVICE

I certify that on May 22, 2021, I provided this brief to the Harris County District Attorney via the EFILETEXAS.gov e-filing system. This service is required by Texas Rule of Appellate Procedure 9.5.

Additionally, I certify that on May 22, 2021, I provided this brief to the State Prosecuting Attorney via the EFILETEXAS.gov e-filing system. This service is required by Texas Rules of Appellate Procedure 68.11 and 70.3.

/s/ Miranda Meador
MIRANDA MEADOR
Assistant Public Defender
Attorney for Respondent

CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief contains 5,437 words. This word-count is calculated by the Microsoft Word program used to prepare this brief. The word-count does not include those portions of the brief exempted from the word-count requirement under Texas Rule of Appellate Procedure 9.4(i)(1). The number of words permitted for this type of computer-generated brief (a brief in response in an appellate court) is 15,000. Tex. R. App. P. 9.4(i)(2)(B).

/s/ Miranda Meador
MIRANDA MEADOR
Assistant Public Defender
Attorney for Respondent

Appendix

Jury Note 1

Impact

CAUSE NO. 1494136

THE STATE OF TEXAS

VS.

Juan Macedo
(Name of Defendant)

AKA _____

IN THE 184 DISTRICT COURT

COUNTY CRIMINAL COURT AT

LAW NO._____

OF HARRIS COUNTY, TEXAS

JURY NOTE NO. 1

We would like to review the 2 exhibits ~~refere~~ referenced by the state in their closing arguments, the exhibits referring to the California arrest and the guilty plea.

FILED
Marilyn Burgess
District Clerk
APR 12 2019
Time: 2:31 pm
Harris County, Texas
By Edalia Fernandez
Deputy

Jeff Kuna
FOREMAN

_____ COURT

Certified Document Number: 84825512 - Page 1 of 1

Attachment 1

Automated Certificate of eService

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Associated Case Party: Juan Macedo

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